No. 12442

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN I. HAAS, INC., a Corporation,
Appellant,

v.

O. L. WELLMAN,
Appellee.

BRIEF OF APPELLANT

Appeal from the United States District Court for the District of Oregon.

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FILED
JUN 17 1950
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JURISDICTION

This cause was commenced in the District Court of the United States for the District of Oregon, to recover the purchase price of a quantity of hops, the amount for which judgment was demanded being $20,098.19, exclusive of interest and costs (Tr. 2, 4).

The District Court had jurisdiction of this cause by reason of Title 28, U.S.C.A., Section 41(1), this being a suit of a civil nature at law where the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000, and is between citizens of different states, the defendant being a citizen of Delaware and the plaintiff of Oregon (Tr. 2, 4). Upon the repeal of that section, the District Court had jurisdiction by reason of Title 28, U.S.C.A., Section 1332.

A final judgment was entered in this cause by the District Court, in favor of the plaintiff, on September 30, 1949, for $19,915.10, together with interest and costs (Tr. 18).

This appeal was taken pursuant to Title 28, U.S.C.A., Section 1291. The notice of appeal from such judgment was filed on October 10, 1949 (Tr. 19).

STATEMENT OF CASE

This appeal is by the defendant from a judgment for the plaintiff in an action for the contract price of hops produced by the plaintiff in the year 1947 and contracted to be sold to the defendant. The hops were rejected by the defendant as not of the grade, quality and condition required by the contract.

This is the third of three cases involving hop sale contracts tried by the same judge, each of which is now before this court on appeal, the records of all three cases being consolidated for the purpose of each appeal. The other cases are Hugo V. Loewi, Inc., Appellant, v. Fred

Geschwill, Appellee, No. 12440, and Hugo V. Loewi, Inc., Appellant, v. Kilian W. Smith, Appellee, No. 12441 (Tr. 9). This court has entered an order in the consolidated appeals of the three cases whereby the briefs filed in this case may adopt by reference any pertinent portions of the briefs filed in the Geschwill case.

After trial of this case without a jury, the court issued a Memorandum of Decision (Tr. 8), signed Findings of Fact and Conclusions of Law prepared by the plaintiff's counsel (Tr. 8-17), and entered judgment for the plaintiff for $19,915.10 with interest and costs.

The contract in question was executed on February 7, 1944, and covered fuggle and cluster varieties of hops to be grown in the year 1947 and delivered to the defendant in processed and baled state. This contract covered only one-half of the plaintiff's 1947 production of hops of the contract quality. The other half was under contract to another dealer, S. S. Steiner, Inc. (Exhibit 1-A, Tr. 53).

This case involves only the cluster hops, as the fuggle hops covered by the contract were accepted and fully paid for by the defendant (Tr. 84).

The contract price for the hops was fixed in the contract at either 45¢ per pound or the market price on such date during a specified period in 1947 as the seller might elect (Exhibit 1-A, Tr. 53). The plaintiff, on September 11, 1947, orally selected the then market price of 85¢ per pound for the cluster hops (Tr. 303). That selection, however, was not confirmed in writing as required by the contract (Tr. 71, 303; Exhibit 1-A, Tr. 53), although

the defendant had issued express instructions that such requirement be complied with (Tr. 228), and had not authorized any departure therefrom (Tr. 217). Unlike the contracts involved in the Geschwill and Smith cases, the contract in this case does not include any provision for premium or discount above or below the contract price by reason of seed, leaf or stem content of the hops (Exhibit 1-A, Tr. 53).

A total of $20,000.00 was advanced periodically by the defendant to the plaintiff as provided by the contract (Tr. 69). These advances were repaid to the defendant through deduction thereof from the defendant's payment for the fuggle hops which it received under the contract (Tr. 84).

The ultimate issues in this case are: (1) whether or not the cluster hops tendered by the plaintiff were of the grade, quality and condition required by the contract, (2) whether, in the event the hops did not conform to the contract requirements, they nevertheless were accepted by the defendant, and (3) whether, in the event the hops did conform to the contract requirements, so that the defendant's rejection was a breach of contract, the plaintiff's measure of recovery is the contract price, or is limited by contract and statute to the difference between the contract price and the market value of the kind and quality of hops described in the contract.

The contract (Exhibit 1-A, Tr. 53) provides that the hops covered thereby

"shall be of prime quality, of even color, well and cleanly picked, free from damage by vermin or disease, properly dried and cured, not broken and shall be in good merchantable order and condition."

The contract further provides that

"should the Buyer fail to accept and pay for the hops herein agreed to be sold, the Seller not being in default in the terms and conditions hereof to be by the Seller kept and performed, in the event the market value of the hops shall be less than the contract value, the Seller shall be entitled to receive, as liquidated and ascertained damages for such breach on the part of the Buyer, the difference in value between the market value of the kind, quality and quantity of hops in this contract mentioned at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified."

The evidence is uncontradicted and conclusive that the market value of such hops on October 31, 1947, was no less than the contract price (Tr. 225; Exhibits 13, 14, Tr. 53, 56, 57), and the District Court so found (Tr. 13).

The defendant rejected the cluster hops tendered to it by the plaintiff by reason of damage of the hops by downy mildew, a disease which discolors the hops from the normal greenish-yellow to a red or brown and kills or prevents the full maturity of the hop cones, and for the further reason that such hops were not well and cleanly picked, and thus were not of prime quality and did not comply with the requirements of the contract (Tr. 445).

The plaintiff made no pretense at the trial that the cluster hops which he tendered to the defendant com-

plied with the express contract description of the hops to be delivered. He admitted that the hops in the bales were not free from damage by disease (Tr. 118, 119) and were not of even color (Tr. 118), by reason of downy mildew which attacked the hops while they were on the vines (Tr. 119), and were not cleanly picked (Tr. 96-98). His witnesses likewise testified that the hops were damaged by mildew (Tr. 132, 154, 161), not cleanly picked (Tr. 152, 154, 155, 161), and not of even color (Tr. 155). The plaintiff acknowledged that he had even offered, prior to inspection of the hops by the defendant, to take a reduction in price because of the poor picking (Tr. 108).

The plaintiff contended that the hops nevertheless were "merchantable" (Tr. 93, 135, 158, 161), or of "good, salable quality" (Tr. 116), and were equal to the average of the hops produced in 1947 in the Willamette Valley (Tr. 93, 133, 134, 135, 152, 153, 158, 160), and that they were accepted by the defendant by reason of the weighing thereof by employees of the defendant's Oregon representative (Tr. 83).

The District Court made no specific finding as to whether or not the hops tendered by the plaintiff to the defendant were of prime quality or otherwise complied with the express description in the contract with respect to grade, quality and condition. The court found merely that the hops were "of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by the defendant under contracts containing in effect the same

provisions as to quality" (Tr. 15). The court also found, however, that the leaf and stem content of the plaintiff's cluster hops was 11 per cent, and that the 1947 Oregon average was 8 per cent (Tr. 13). The plaintiff's hops thus exceeded the average in extraneous leaf and stem content by more than 37 per cent.

A heavy infestation of downy mildew developed in many of the cluster hop yards in the Willamette Valley in Oregon in July and early August, 1947. The attack that year was almost unique in that it came late in the growing season and thus affected the hops themselves rather than merely the vines (Tr. 98, 340).

The plaintiff's cluster yard was one of the yards thus affected (Tr. 98, 99). Nevertheless, he decided to proceed with the harvest and requested and obtained from the defendant a final harvesting advance of $5,000.00. This was only half of such advance provided for by the contract, but was deemed sufficient because of the reduced crop resulting from the mildew attack (Tr. 73, 278, 397, 398).

The business dealings of these parties in 1947 and prior years were conducted through A. J. Ray & Son, Inc., of Hillsboro, Oregon, which for many years had purchased hops in Oregon for the defendant (Tr. 163). Prior to 1947, the defendant frequently had authorized that firm to accept or reject contracted hops on the basis of the defendant's inspection of preliminary "type" samples of those hops, in which case the Ray firm had the responsibility of determining, by its examination of each bale and of 10th bale samples, which bales of

the hops were equal in quality to the type samples approved by the defendant, and of taking delivery of those bales and rejecting any other (Tr. 234, 248, 249).

In 1947 the defendant did not inspect merely the type samples, but required the Ray firm to send 10th bale samples correctly representing each lot of hops, in addition to the type samples, to the defendant's office in Washington, D. C., for inspection there by the defendant. The Ray firm was authorized to accept only such hops as were approved by the defendant after its own inspection of both the type samples and the 10th bale samples (Tr. 166, 233, 437, 448-450, 461; Exhibit 18, Tr. 53, 57, 422; Exhibit 7, Tr. 53, 56, 250; Exhibit 3-G, Tr. 53, 54).

This procedure was followed in 1947 relative to the plaintiff's cluster hops. Four type samples were drawn from bales of those hops and forwarded to the defendant in Washington, D. C. (Exhibit 3-E, Tr. 53). Thereafter, when all of the hops had been baled and warehoused by the plaintiff, employees of the Ray firm drew nineteen 10th bale inspection samples which were representative of the entire lot of 193 bales, and these samples likewise were sent on to the defendant (Tr. 80, 306; Exhibit 3-J, Tr. 53, 54). After the defendant's inspection of these samples, the defendant instructed the Ray firm to reject the entire lot of cluster hops, as not of contract grade, quality or condition (Exhibit 3-U, Tr. 53, 55; Tr. 186, 187). The uncontroverted evidence in this case shows clearly that neither the Ray firm nor any one connected therewith had any authority at any time to accept or

take delivery on behalf of the defendant of any of the plaintiff's 1947 crop cluster hops (Tr. 217, 437).

There were parts of the plaintiff's cluster yard which the mildew attack did not reach at all (Tr. 103). From one part of his yard which was practically free of mildew (Tr. 104), the plaintiff harvested separately from any other hops the equivalent of about 64 bales of hops. These hops showed little or no mildew. The first type sample taken for the defendant was drawn from a bale of these hops at the hop yard on September 13 by Gilbert Davis, an employee of the Ray firm. The plaintiff informed Mr. Davis at that time that he had in the bins separate from any other hops the equivalent of about 64 bales of hops equal in quality to that sample (Tr. 348, 349). This sample therefore was designated as representative of an estimated 32 bales of equal quality to be available for delivery under the defendant's one-half contract share of the plaintiff's production (Tr. 170; Exhibit 3-E, Tr. 53). This first sample showed little or no mildew, but an additional three type samples drawn thereafter as the harvesting and baling progressed, did contain considerable mildew, including many of the mildew-killed hops known as "nubbins" (Tr. 367). All four of the type samples were sent to the defendant in Washington, D. C., on September 15 (Exhibit 3-E, Tr. 53, 349).

The plaintiff warehoused 386 bales of cluster hops, of which 193 bales were each sampled and 10th bale samples taken therefrom by employees of the Ray firm on September 25th. The other half was similarly sampled

at that time by representatives of the other buyer, S. S. Steiner, Inc. (Tr. 80). This sampling was done in the usual manner and is acknowledged by the plaintiff to have been done properly (Tr. 80, 116).

Only one or two bales were found equal to the first type sample taken by the defendant on September 13, and when questioned as to what had been done with the 32 bales supposedly represented by that sample, the plaintiff explained that he had not baled separately the estimated 64 bales of hops harvested from the mildew-free part of his yard and which he had on hand when that first type sample was taken, but that he had thereafter mixed and baled those good hops with the hops harvested from the rest of his yard (Tr. 104, 170, 171, 309, 310, 396). The 10th bale samples accordingly were designated as representative of the entire 193 bales, and sent on to the defendant. The defendant was informed of the disappearance of the 32 bales and that the first type sample therefore should be cancelled (Tr. 172; Exhibit 3-J, Tr. 53, 54; Exhibit 3-M, Tr. 53, 54; Exhibit 3-N, Tr. 53, 54).

A "split" or approximately one-half of each of the 10th bale samples was retained in the office of the Ray firm. Several of these are in evidence as Exhibits 11-A to N (Tr. 53, 56, 150, 172).

Samples of the plaintiff's cluster hops were drawn by the Federal-State Inspection Service at the same time that the 10th bale samples were being drawn by the Ray firm, for the purpose of making its official determination of the leaf, stem and seed content of the hops. The gov-

ernment analysis of those samples was made at a later date and was not known by either party until issuance on October 9th of the official Inspection Certificate (Tr. 196, 333; Exhibit 1, Tr. 53), showing the hops to contain 11 per cent by weight of extraneous leaves and stems. Such leaf and stem content does not include hops damaged by mildew, such as nubbins (Tr. 200, 343). This 11 per cent leaf and stem content of the plaintiff's hops is far in excess of the average for Oregon hops of that year, according to official records of the Federal-State Inspection Service (Tr. 342, 343).

Upon completion of their sampling of the cluster hops on September 25, the employees of the Ray firm proceeded to weigh all of the 193 bales. This was done in order to avoid the necessity of again unpiling and weighing the bales in the event of their later acceptance by the defendant (Tr. 166, 283, 311, 447, 448). Mr. Ray previously had instructed Mr. Noakes, manager of the Salem office of A. J. Ray & Son, Inc., who was handling the arrangements with the plaintiff, that inasmuch as the Ray firm had no authority to accept hops except upon express instructions of the defendant following the defendant's examination of 10th bale samples, Mr. Noakes must not take 10th bale samples or weigh any grower's hops without having an understanding with the grower that such would not constitute an acceptance (Tr. 166, 167, 280, 281, 317, 324, 325, 330, 331). These instructions to Mr. Noakes were in accordance with express instructions from the defendant (Tr. 180, 182; Exhibits 3-H, 3-I, Tr. 53, 54).

The defendant, on September 25, telegraphed the Ray firm to notify each grower by letter that sampling and weighing would not constitute acceptance (Exhibit 5, Tr. 53, 56, 185). Accordingly the Ray firm addressed a letter to each grower under contract with the defendant explaining that hops tendered under the contract would be inspected, sampled and weighed as rapidly as possible, with the understanding that such would not constitute an acceptance of the hops, and that the 10th bale inspection samples would be sent to the defendant in Washington, D. C., for examination and decision (Exhibit 12, Tr. 53, 56). Such letter, however, was not sent to the plaintiff for the reason that his hops already on that date were being sampled and weighed by Mr. Noakes acting under specific instructions from Mr. Ray first to obtain the plaintiff's oral agreement that such would not be an acceptance (Tr. 193, 194, 271-273).

Mr. Noakes testified that he did have an oral agreement with the plaintiff that the sampling and weighing of the cluster hops would not be considered an acceptance of the hops; that the plaintiff was anxious to get away on a hunting trip and urged that he inspect the hops as soon as possible and that Mr. Noakes told him that the only way he could possibly do so was for him to go through the hops, draw 10th bale samples and send them on to Washington, D. C., for approval; and that Mr. Noakes suggested that the hops also be weighed at that time to save taking the hops out for weighing in the warehouse at a later date, but all without accepting the hops because he had no authority to accept them under any conditions (Tr. 283, 284). Mr. Noakes fur-

ther testified that in the warehouse immediately after weighing the hops he again told the plaintiff that the 10th bale samples had to be sent in for approval (Tr. 332). This testimony was corroborated by Mr. Davis (Tr. 369).

The plaintiff denied having any such oral agreement or any conversation relative to the sampling and weighing of the hops on September 25 not being an acceptance (Tr. 398) and denied that he was told prior to or immediately after the weighing that the samples were to be sent to the defendant (Tr. 405). He did acknowledge, however, that shortly after his return from his hunting trip on October 5 he was told by Mr. Noakes that the Ray firm had no authority to accept hops and must send all samples to the Washington, D. C., office for acceptance or rejection (Tr. 406, 409).

Mr. Howard Eismann, Oregon representative of S. S. Steiner, Inc., the contract purchaser of the other half of the plaintiff's hops, testified that the Steiner firm rejected its half of the cluster hops because they were of poor quality and not equal to contract specifications similar to those of the defendant's contract (Tr. 380, 381). He also testified that he had an oral understanding with the plaintiff prior to his sampling and weighing of the hops for the Steiner firm that such would not constitute an acceptance, but that the plaintiff later refused to recognize that agreement (Tr. 377-380), and the plaintiff denied having had any such agreement (Tr. 90). He further testified that Mr. Noakes of the Ray firm told him prior to the weighing of the defendant's

share of the hops that Mr. Noakes had an understanding with the plaintiff that the sampling and weighing of those hops would not constitute an acceptance (Tr. 378).

Mr. Noakes reported to Mr. Ray on the evening of September 25 that he had inspected, sampled and weighed the plaintiff's hops with the plaintiff's agreement that such would not be considered an acceptance of the hops (Tr. 168, 196, 263, 264), and the Ray firm in turn reported to the defendant that it had inspected the plaintiff's hops without committing the defendant to acceptance of those hops (Exhibit 3-O, Tr. 53, 54; Tr. 200; Exhibit 3-Q, Tr. 53, 55, 205, 206).

On October 18 the defendant, following its inspection of the 10th bale samples, instructed A. J. Ray & Son, Inc., to reject the plaintiff's cluster hops (Exhibit 3-U, Tr. 53, 55, 186, 187; Exhibit 3-W, Tr. 53, 55).

There is no conflict of evidence relative to the quality of the type and 10th bale samples of the plaintiff's cluster hops on which the defendant based its refusal to accept the hops. Mr. Frederick Haas, Vice-President of the defendant, saw the type samples in the office of the Ray firm in September and found them to be very poor, showing damage by mildew, including "little red nubbins throughout the hops," not even colored, and not cleanly picked (Tr. 443, 444). Mr. Haas also personally examined the 10th bale samples in the defendant's Washington, D. C., office and found them to be substantially damaged by mildew disease and poorly picked, and obviously not of prime quality (Tr. 444). He testified that they were rejected by the defendant because

they were not free from disease and were not cleanly picked, as called for in the contract specifications (Tr. 445).

Mr. Harold W. Ray, President and Manager of the Ray firm, testified that the 10th bale samples, which he examined prior to sending them to the defendant, showed that the hops were very dirty picked, and were damaged by mildew, including a large content of brown mildewed nubbins which made the hops very undesirable, and that not one of the 10th bale samples came up to prime quality (Tr. 182-184). Mr. Gilbert Davis, who drew the type samples and assisted in drawing the later 10th bale samples, testified that the samples had considerable mildew discoloration (Tr. 360, and that the hops were not cleanly picked (Tr. 368).

These descriptions of the samples were corroborated by the defendant's expert witnesses, Howard Eismann and H. V. Franklin, who examined in the courtroom the 10th bale samples in evidence as Exhibit 11-A to N (Tr. 53, 56, 150, 172). Mr. Eismann testified that the samples could not have been prime quality hops when drawn from the bales because they were dirty picked and contained a "great quantity" of downy mildew damage. He pointed out that each sample contained a substantial quantity of nubbins and also showed a decided damage to many of the burrs, as well as burrs which, because of the mildew, were only partially developed (Tr. 373). He explained that the hops were "dirty picked" and not "well and cleanly picked" because of the high percentage of leaves and stems (Tr. 374). He

further testified that the mildew discoloration of many of the burrs prevented the hops being of even color and that there could be no possible doubt that the hops were not of prime quality (Tr. 374, 375), and that although such hops would be merchantable they were not "good" merchantable hops (Tr. 375).

Mr. Franklin described the hops as containing considerable mildew damage and being dirty picked, with about half the hop cones showing mildew damage and with discoloration from mildew appearing throughout the samples; that the hops were not of even color, not free from damage by disease, and not well and cleanly picked as that term is commonly used in the industry (Tr. 394). He found the damage by mildew to be readily apparent and beyond question (Tr. 394).

Upon receipt of the defendant's rejection of the cluster hops, Mr. Ray instructed Mr. Noakes to communicate that rejection to the plaintiff (Tr. 187, 188, 201, 202, 266, 273), and Mr. Noakes reported to Mr. Ray that he had done so on October 28 (Tr. 189, 204, 267). The Ray firm then notified the defendant that the plaintiff's cluster hops had been rejected as per instructions (Exhibit 3-Y, Tr. 53, 55; Tr. 190, 191). Notation of such rejection was indorsed upon the original weight sheets during the last week in October by the office manager of the Ray firm (Tr. 264, 265; Exhibit 2, Tr. 53).

The fuggle hops tendered by the plaintiff under the contract were accepted by the defendant and paid for in full. The defendant was reimbursed for all advances it had made under the contract, including the harvest

advance on the cluster hops, by deduction of the amount thereof from the sum payable for the fuggle hops. A check for the balance and in full settlement for the fuggle hops was delivered to the plaintiff by Mr. Noakes, and was accepted by the plaintiff, on October 28, and was cashed by the plaintiff. A detailed statement of the account accompanied the check (Tr. 84, 294, 295; Exhibits 1-B, 1-E, Tr. 53).

Mr. Noakes testified that at the time he notified the plaintiff, on October 28, that his fuggle hops were accepted, and paid him for those hops by giving him a check for the balance remaining after deduction of all the advances, he also informed the plaintiff that the defendant could not accept the cluster hops on the contract because they did not make the grade due to the picking (meaning excessive extraneous matter) and the mildew damage (Tr. 292, 293, 295, 296, 320, 321), and that the plaintiff understood that the quality of the hops was such that the defendant would not accept them (Tr. 321).

This was corroborated by Gilbert Davis, who was present on October 28 when the fuggle hops were paid for, and who testified that he heard Mr. Noakes tell the plaintiff that "We can't take those late hops, Otto" (Tr. 355). Both Mr. Noakes and Mr. Davis testified that when told that the cluster hops were not accepted, the plaintiff threatened to withhold delivery of the fuggle hops but finally handed to Mr. Noakes the warehouse receipt for the fuggles (Tr. 293, 355, 356).

The plaintiff denied that he was informed that his

cluster hops were rejected or not accepted by the defendant (Tr. 85, 87, 88, 91, 92, 109, 401). His version of the discussion on October 28 is that Mr. Noakes told him that "The lates (meaning cluster hops) just haven't come through" (Tr. 402). His complaint (Tr. 4) alleges, however, and the District Court found (Tr. 14, 15) that in October, 1947, the defendant advised the plaintiff that it did not wish to take the hops and at that time and from time to time thereafter suggested that the plaintiff try to find some other buyer for the hops.

Testimony by Mr. Noakes that he told the plaintiff that the cluster hops were "not very good quality" (Tr. 285) and that the plaintiff asked Mr. Noakes to try to dispose of the hops (Tr. 295, 298) is not denied by the plaintiff. In fact the plaintiff testified that when Mr. Noakes told him that he had not done too good a job of picking he replied, "Cliff, I know that, I have done the best I could" (Tr. 78, 79), and that when Mr. Noakes told him they should have been "a little better picked" he told Mr. Noakes that he would be willing to take a cut in price because of the leaf and stem content (Tr. 108).

The plaintiff discussed his cluster hops with Mr. Noakes and with Mr. Ray on several occasions after the acceptance of and payment for his fuggle hops on October 28. He conferred with Mr. Ray on two occasions prior to the Christmas holidays in 1947. The testimony of the plaintiff and of Mr. Ray concerning the discussions on those occasions is in agreement that Mr. Ray told the plaintiff that he would do his best to find a

buyer for the cluster hops, that Mr. Ray told the plaintiff that he thought the defendant had a moral, but not a legal, obligation to pay for the hops, and that Mr. Ray further stated that because of the mildew it probably was harder to move these hops (Tr. 86, 109, 206, 207, 210). Both witnesses further agreed that during these discussions no mention was made of any payment for the cluster hops, and that the plaintiff made no inquiry concerning payment and no demand for payment (Tr. 86, 209). Nor did the plaintiff ever ask Mr. Noakes for payment, or inquire why he had not been paid for the cluster hops (Tr. 297).

Mr. Ray further testified concerning those discussions that the plaintiff at that time inquired whether there might be some sort of cash settlement whereby the defendant would stand part of the loss on the cluster hops, and that Mr. Ray told the plaintiff that he didn't think there was any chance that the defendant would do so (Tr. 208). This was corroborated by Mrs. Townsend, the office manager of Mr. Ray's office, who overheard that discussion between Mr. Ray and the plaintiff (Tr. 259). Mr. Ray further testified that he advised the plaintiff to do everything he could to find a place for the cluster hops himself (Tr. 260). None of this testimony was denied by the plaintiff.

The plaintiff's cluster hops are not listed in the Ray firm's hop books wherein are recorded all acceptances of hops for the defendant (Tr. 269). No insurance was carried by the Ray firm or by the defendant on the plaintiff's cluster hops, although it was the practice of

the Ray firm promptly to bring under its blanket fire insurance policy all hops accepted for the defendant (Tr. 211, 212, 268). No warehouse receipt covering the cluster hops was delivered or tendered to the defendant or to the Ray firm (Tr. 105, 298).

The 193 bales of cluster hops which the plaintiff had tendered to the defendant and which the defendant had rejected were resold by the plaintiff on May 7, 1948, at a price of 31 cents per pound, and the plaintiff received therefor the total sum of $11,904.31, which according to the evidence was a fair price for those hops on that date (Tr. 91, 226, 370, 371).

SPECIFICATION OF ERRORS

The District Court erred:

1. In finding that by the contract of February 7, 1944, the plaintiff agreed to sell and the defendant agreed to buy one-half of the salable crop of hops grown by the plaintiff in 1947 on his farm, and in basing the judgment thereon (Tr. 10). Such finding is clearly erroneous and is unsupported by substantial evidence, as the agreement itself implies and the law provides that the defendant was required to accept and pay for only those hops which met the standards of quality and condition specified in the agreement (Exhibit 1-A, Tr. 53).

2. In finding that the one-half of the 1947 crop of late cluster hops involved here was duly grown and raised by plaintiff on said farm, and in basing the judgment thereon (Tr. 10). Such finding is clearly erroneous

and is unsupported by substantial evidence, if such finding is construed to mean that the plaintiff grew and raised cluster hops of such character as to meet the obligations imposed on him by said contract, as the undisputed evidence established that the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96, 118, 182, 373-375, 393, 443-445).

3. In finding that before and at the time of picking the defendant knew that said crop of cluster hops would in normal course show such mildew when picked and baled, and in basing the judgment thereon (Tr. 11). Such finding is clearly erroneous and is unsupported by substantial evidence. Furthermore, this finding is wholly irrelevant and immaterial as the plaintiff assumed the risk of mildew damage in his baled hops.

4. In finding that the mildew in said late cluster hops did not become more pronounced or prevalent after the defendant elected to make such advance payment, and in basing the judgment thereon (Tr. 11). Such finding is clearly erroneous and is unsupported by substantial evidence.

5. In finding that the plaintiff duly raised, harvested, cured and baled said crop of 1947 late cluster hops, and in accordance with said contract delivered the same in warehouse at Mt. Angel, Oregon, and in basing the judgment thereon, if such finding is construed to mean that the plaintiff raised, harvested, cured and baled hops of such character as to meet the obligations imposed upon him by said contract (Tr. 12). Such finding is

clearly erroneous and is unsupported by substantial evidence, as the undisputed evidence establishes that the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96, 118, 182, 373-375, 393, 443-445).

6. In finding that on September 25, 1947, at said warehouse defendant caused one-half of said 1947 crop of late cluster hops to be segregated in a manner which was acceptable to defendant and which was in conformance with the prior practice of the parties, and that at that time the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant, and were identified, appropriated to the contract and set aside, and in basing the judgment thereon (Tr. 12). Such finding is clearly erroneous and is unsupported by substantial evidence. If said finding can be construed to mean that the plaintiff appropriated said hops to the contract with the assent of the defendant, there is no evidence that the defendant expressed any assent whatever, that is, expressed irrevocably a willingness to take as its own the hops appropriated by the plaintiff. The only evidence on this point is that the defendant, by rejecting the hops, expressed a decided unwillingness to take them as its own (Tr. 4, 14, 15). Furthermore, there is no evidence whatever that the defendant received said hops at any time. Finally, said hops were not inspected at that time or place, but were subsequently inspected at the defendant's office at Washington, D. C. (Tr. 437, 444, 445, 447).

7. In finding that the plaintiff duly performed all of the terms and conditions of said contract on his part to be performed, and in basing the judgment thereon (Tr. 12). Such finding is clearly erroneous and is unsupported by substantial evidence, if the contract is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96, 118, 182, 373-375, 393, 443-445).

8. In finding that at the time said contract was entered into, and at the time of the delivery and weighing of the late cluster hops, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing of hops by the buyer following such an inspection constituted an acceptance of such hops, and in basing the judgment thereon (Tr. 12). Such finding is clearly erroneous and is unsupported by substantial evidence. There is insufficient evidence to establish that any such usage or custom existed at any time mentioned in such finding, or at any other time. Furthermore, whether any such usage or custom existed at any time after said contract was entered into, is wholly irrelevant and immaterial. If any such usage or custom did exist at any material and relevant time, it cannot be applied under the circumstances of this case. Finally, there is no evidence whatever that said hops were inspected by the defendant at the time of or before the weighing of said hops. The only inspection by the defendant was subsequently made in Washington, D. C. (Tr. 437, 444, 445, 447).

9. In finding that the parties did not agree upon any change in or deviation from, and plaintiff did not waive, said custom and usage, and in basing the judgment thereon (Tr. 12). Such finding is clearly erroneous and is unsupported by substantial evidence.

10. In finding that the defendant in fact accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff, and in basing the judgment thereon (Tr. 12, 13). Such finding is clearly erroneous and is unsupported by substantial evidence, and is contrary to law, in that it is acknowledged by the plaintiff in his complaint and the court has found as a fact that in October, 1947, the defendant notified the plaintiff that it did not wish to take said hops (Tr. 4, 14, 15). It is undisputed that the defendant refused to accept such hops, in October, 1947.

11. In finding that said grower market price of 85 cents a pound for said late cluster hops was selected by plaintiff and communicated to defendant in a manner and at a time which was acceptable to the defendant and which conformed to the prior practice between the parties and in basing the judgment thereon (Tr. 13). Such finding is clearly erroneous and is unsupported by any substantial evidence, as it is undisputed that the plaintiff did not designate any grower market price in writing as required by said contract.

12. In finding that according to the general custom and usage of the trade that year, which was known to the parties, such leaf and stem content was compensated for, and the grower market price was computed, by de-

ducting one cent per pound for each one per cent that the leaf and stem content exceeded eight per cent, and in basing the judgment thereon (Tr. 13). Such finding is clearly erroneous and is unsupported by substantial evidence, as there is insufficient evidence that such custom or usage existed at any time which was material and relevant. Furthermore, such custom and usage can not be given effect contrary to the express terms of the contract (Exhibit 1-A, Tr. 53).

13. In finding that the parties designated the grower market price pursuant to said contract at 85 cents per pound without reference to leaf and stem content, and in basing the judgment thereon (Tr. 13, 14). Such finding is clearly erroneous and is unsupported by any substantial evidence. The undisputed evidence shows that no designation was made by the plaintiff, in writing, as required by said contract. Furthermore, if any designation was made by the plaintiff of said grower market price, in conformity to the terms of said contract, such designated price was for hops of the standards of grade, quality and condition specified in such contract (Exhibit 1-A, Tr. 53).

14. In finding that the grower market price for said hops under said contract was 85 cents per pound net weight, less three cents per pound deduction for leaf and stem content, and that the contract price for said hops was 82 cents per pound, or a total of $30,863.16, and in basing the judgment thereon (Tr. 14). Such finding is clearly erroneous and is unsupported by substantial evidence. It is contrary to the express terms of

the contract. Furthermore, said price of 82 cents per pound was not selected by the plaintiff in the manner required by said contract, and is not binding upon the defendant. The plaintiff, not having selected a market price in accordance with the terms of the contract, is bound by the floor price stated in said contract, 45 cents per pound (Exhibit 1-A, Tr. 53).

15. In finding that when the hops were tendered to defendant and defendant had inspected the same as aforesaid, and subsequently when defendant advised plaintiff that it did not wish to take said hops, defendant did not specify any particular objection it may have had to said hops, and in basing the judgment thereon (Tr. 14). Such finding is clearly erroneous and is unsupported by substantial evidence, except that portion which declares that the defendant advised the plaintiff that it did not wish to take said hops. Furthermore, such hops were not inspected at the time of tender or weighing or on that occasion, as they were subsequently inspected by the defendant in Washington, D. C. (Tr. 437, 444, 445, 447).

16. In finding that at the trial the defendant advanced two specific objections that said cluster hops showed some mildew and were somewhat above average in leaf and stem content, and in basing the judgment thereon (Tr. 14, 15), if that finding is construed to mean that the defendant contended that the degree of mildew infestation was slight, and that said hops were only slightly above average in leaf and stem content. Such finding is clearly erroneous and is unsupported by sub-

stantial evidence, as the evidence is undisputed that the defendant contended at the trial that the plaintiff's hops were substantially damaged by mildew and were substantially above average in leaf and stem content (Tr. 96-98, 182, 342, 374, 393, 445).

17. In finding that upon the facts neither claimed defect (that said hops showed mildew and were above average in leaf and stem content), was material, and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, as it is undisputed that if the agreement between the parties is construed in the manner advocated by the defendant, the failure of the plaintiff's hops to meet the standards of grade, quality and condition specified in the agreement, was substantial (Tr. 96-98, 118, 182, 373-375, 393, 443-445).

18. In finding that the plaintiff delivered the very hops which were covered by the contract and upon which the defendant had made advance payments, and in basing the judgment thereon (Tr. 54). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract covered future or unascertained goods deliverable only after processing (Exhibit 1-A, Tr. 53). Furthermore, the contract implies and the law provides that the defendant was bound to accept and pay for only hops meeting the standards of grade, quality and condition specified in the contract.

19. In finding that the defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said crop of cluster hops

would be any different in condition or quality than said crop actually was when tendered and delivered, and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, as the contract plainly implies and the law provides that the defendant was not obligated to accept and pay for any hops tendered to it which did not meet the standards of grade, quality and condition specified in such contract (Exhibit 1-A, Tr. 53). In the absence of evidence to the contrary, it must be conclusively presumed that the defendant did rely upon the warranty in the contract; there was no such evidence.

20. In finding that said cluster hops were of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by the defendant under contracts containing in effect the same provisions as to quality, and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, and does not form a proper basis for the judgment, as the contract cannot be construed to mean that average quality hops meet the standards of grade, quality and condition specified therein. Furthermore, such finding is wholly irrelevant and immaterial.

21. In finding that said cluster hops, upon tender and delivery, substantially conformed to the quality provisions of said contract and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant,

as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96-98, 118, 182, 373-375, 393, 443-445).

22. In finding that without rejecting said late cluster hops defendant advised plaintiff in October, 1947, that it did not wish to take said hops, and in basing the judgment thereon (Tr. 15). The defendant acknowledges that it advised the plaintiff in October, 1947, that it did not wish to take said hops, and acknowledges that such portion of said finding is proper. The remainder of such finding is clearly erroneous and is unsupported by substantial evidence, and is contrary to law. By refusing to accept said hops, and so notifying the plaintiff, the defendant rejected them, as a matter of law.

23. In finding that the parties hereto from time to time negotiated with respect to the disposition of said hops until on or about May 3, 1948, when defendant finally renounced all liability under said contract, and in basing the judgment thereon (Tr. 15). Such finding is clearly erroneous and is unsupported by substantial evidence, as the evidence establishes that the defendant did no more than to attempt to find another buyer for the plaintiff's hops.

24. In finding that there had been a material decline in the general market price and demand for 1947 Oregon late cluster hops, and in basing the judgment thereon (Tr. 15, 16). Such finding is clearly erroneous and is unsupported by substantial evidence, as this finding is contrary to the undisputed evidence in this case (Geschwill Exhibit 33, Tr. 285; Tr. 361, 363, 416, 419).

25. In finding that the defendant was in default in the payment of the purchase price of said cluster hops and that $19,915.10 was due and owing from the defendant, as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's cluster hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 96, 118, 182, 373-375, 394, 443-445). The defendant's rejection of said hops was therefore justified.

26. In deciding that the plaintiff substantially performed all of the terms and conditions of the agreement between the parties on his part to be performed (Tr. 16). Such finding is clearly erroneous and is unsupported by substantial evidence, if the agreement is construed in the manner advocated by the defendant, as the plaintiff did not tender to the defendant hops of contract grade, quality and condition (Tr. 96, 118, 182, 373-375, 394, 443-445).

27. In deciding that the property in said cluster hops passed to the defendant (Tr. 16), as this decision is contrary to law for two reasons: (1) As this was a sale for cash, title did not pass to the defendant as the defendant has never paid for the hops. (2) If this was not a sale for cash or cash on delivery, title did not pass as the hops did not meet the standards specified in the contract and the conditional assent of the defendant to the appropriation of the hops, implied from the delivery of the hops to the warehouse by agreement, was withdrawn by the rejection of such hops.

28. In deciding that the defendant became obligated to pay the plaintiff on or before October 31, 1947, the sum of $30,863.16, less the proceeds of the resale (Tr. 16, 17), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 96, 118, 182, 373-375, 394, 443-445).

29. In deciding that the defendant wrongfully refused to and did not perform its obligation under said contract (Tr. 17), as the undisputed evidence in this case establishes that, if this contract is construed in the manner advocated by the defendant, the plaintiff's cluster hops did not meet the standards specified in the contract and the defendant was not bound to accept them (Tr. 96, 118, 182, 373-375, 394, 443-445).

30. In deciding that the measure of the plaintiff's recovery upon the facts here is, under the Oregon law, the difference between the amount claimed to be due under said contract and the amount realized from the resale (Tr. 17), as the contract provides that in the event of a breach by the buyer, the measure of damages is fixed and determined to be the difference in value between the market value of the kind, quality and quantity of hops mentioned in the contract, at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified (Exhibit 1-A, Tr. 53). The plaintiff is bound by that provision.

31. In failing and refusing to apply the provision in said contract (Exhibit 1-A, Tr. 53), which fixed and determined the measure of damages as the difference in value between the market value of the kind, quality and quantity of hops mentioned in the contract, at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified (Exhibit 1-A, Tr. 53). The plaintiff is bound by that provision.

32. In failing and refusing to sustain the first defense in the defendant's answer (Tr. 6), as the contract provides that in the event of a breach by either party, the measure of damages is fixed and determined to be the difference in value between the market value of the kind, quality and quantity of hops mentioned in the contract, at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified (Exhibit 1-A, Tr. 53). The plaintiff is bound by that provision.

ARGUMENT

Summary of Argument

I. The findings of fact with respect to the quality and condition of the hops tendered by the plaintiff to the defendant, are clearly erroneous and are unsupported by any substantial evidence.

II. The defendant was not bound to take delivery of the plaintiff's hops and was justified in rejecting them.

III. The court erred in concluding as a matter of law that the plaintiff substantially performed all of the terms and conditions of the contract on his part to be performed, and that the defendant wrongfully refused to and did not perform its obligation under said contract.

IV. The finding of fact that the defendant accepted the plaintiff's cluster hops is clearly erroneous and is unsupported by any substantial evidence, and is contrary to law.

V. The finding of fact that the defendant did not reject the plaintiff's hops is clearly erroneous and is unsupported by any substantial evidence, and is contrary to law.

VI. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the facts of this case do not bring it within the operation of the provisions of the Uniform Sales Act which permit such an action.

VII. The court erred in concluding as a matter of law that the property in the plaintiff's cluster hops passed to the defendant, and that the defendant became obligated to pay an amount claimed to be the price of the hops under said contract, less the amount realized from the resale.

VIII. The plaintiff is not entitled to maintain this action for the price of the hops for the reason that the contract itself precludes that measure of recovery.

IX. The court erred in concluding as a matter of law that the measure of the plaintiff's recovery upon the

facts here is, under Oregon law, the difference between the amount due under said contract and the amount realized from the resale.

I

THE FINDINGS OF FACT WITH RESPECT TO THE QUALITY AND CONDITION OF THE HOPS TENDERED BY THE PLAINTIFF TO THE DEFENDANT, ARE CLEARLY ERRONEOUS AND ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE

The defendant contends that no substantial evidence was introduced tending to establish that the hops tendered by the plaintiff to the defendant met the standards of quality and condition specified in the contract of sale.

The contract describes the grade, quality and condition of the hops to be delivered in these words (Exhibit 1-A, Tr. 53):

> "The said hops shall be of prime quality, of even color, well and cleanly picked, free from damage by vermin or disease, properly dried and cured, not broken and shall be in good merchantable order and condition."

It is evident that this clause is similar to the comparable provision in the Geschwill contract.

The portions of the Findings of Fact claimed to be clearly erroneous and not supported by any substantial evidence, will be considered separately.

1. Paragraph 14 of Findings of Fact (Tr. 15):

> "Said hops were of substantially the average quality of such Oregon late cluster hops actually accepted in 1947 both by the hop trade generally and by defendant under contracts containing in effect the same provisions as to quality. Said hops upon tender and delivery as aforesaid substantially conformed to the quality provisions of said contract."

This is practically identical to the corresponding finding in the Geschwill case. Consequently the three minor headings in that brief, page 21, are retained.

1. Paraphrase of Paragraph 14 of Findings of Fact (Tr. 15):

(a) Hops which are of average quality and condition conform to the warranty contained in the contract.

The testimony concerning the meaning which must be given to the warranty in this contract, was introduced in the Geschwill case. A summary appears in the brief filed in that case, pages 21 and 22, which is incorporated herein by reference.

By reason of the stipulation and order under which these cases were tried, no similar evidence was received in this case (Geschwill Tr. 503, 504), except that Mr. Ray and Mr. Haas stated that "prime quality" does not mean "average quality of the year for the state" (Tr. 224, 451).

The defendant contends that inasmuch as the description of the hops to be delivered is almost the same

in these two cases, the authorities and practical considerations which are discussed under heading I, subdivision 1(a), in the Geschwill brief, pages 23 to 27, establish that the term "prime quality" in the Wellman contract does not mean "average quality for the year in which grown," but that it does mean that the hops shall be of prime quality, of even color, well and cleanly picked, free from damage by vermin or disease, properly dried and cured, not broken and shall be in good merchantable order and condition.

1. Paraphrase of Paragraph 14 of Findings of Fact (Tr. 15):

(b) The plaintiff's hops were of average quality and condition, and conformed to the warranty.

Witnesses called by the plaintiff testified that his hops were equal to the average of the hops produced in 1947 in the Willamette Valley (Tr. 133-135, 152, 153, 158, 160). They also said that his hops were "merchantable" (Tr. 135, 158, 161). These witnesses acknowledged, however, that such hops were damaged by mildew (Tr. 132, 154, 161), were not cleanly picked (Tr. 152, 154, 155, 161), and were not of even color (Tr. 155).

The plaintiff himself admitted that his baled hops were not free from damage by disease (Tr. 118, 119), were not of even color by reason of downy mildew (Tr. 118, 119), and were not cleanly picked (Tr. 96-98). The plaintiff testified that his hops were nevertheless "merchantable" (Tr. 93), or of "good, salable quality" (Tr. 116), and were equal to the average of the hops

produced in 1947 in the Willamette Valley (Tr. 93).

All of this testimony was directed to the question whether the plaintiff's hops were of average quality for the year in which grown, in the Willamette Valley. None of it had any bearing on the real issue whether the plaintiff's hops were of "prime quality" as that term is defined in the warranty.

The testimony introduced by the defendant, on the other hand, establishes that this plaintiff's hops were heavily damaged by mildew, and that they were therefore not of prime quality, and were not of "even color," or "cleanly picked," as expressly required by the contract (Exhibit 1-A, Tr. 53; Tr. 182-184, 343, 373-375, 393, 394, 443-445).

Two disinterested witnesses, Mr. Howard Eismann and Mr. H. F. Franklin, testified that the 10th bale samples of the plaintiff's hops examined by them were not of prime quality because they showed considerable mildew damage, were not cleanly picked, were not of even color, and were not free of damage by disease. Mr. Eismann stated that these samples showed a great quantity of downy mildew damage in that they contained a substantial number of nubbins, dead, brown burrs or cones, and that many of the burrs were damaged by mildew to such an extent that they were of a brownish red color. Mr. Franklin stated that the samples showed considerable mildew damage; he added that about half of the cones were discolored from mildew (Tr. 373-375, 393, 394).

Mr. Frederick J. Haas, Vice-President of the defend-

ant, and Mr. Ray, the defendant's Oregon representative, both testified in its behalf. Both stated that the plaintiff's hops were seriously damaged by mildew and were not cleanly picked. Both stated that the hops were not of prime quality, were not of even color and were not free from damage by disease. Mr. Ray stated that the hops were "very dirty picked" (Tr. 182-184, 222, 223, 443-445).

The testimony of Mr. Bert W. Whitlock is significant. He was then in charge of hop inspection work on the Pacific Coast for the U. S. Department of Agriculture with particular reference to the leaf and stem and seed content of hops. He testified that approximately 83 per cent of the hops grown in Oregon in 1947, had a leaf and stem content of less than 11 per cent and that the remaining 17 per cent of such hops had a leaf and stem content of 11 per cent or more (Tr. 341, 342). The average leaf and stem content in Oregon hops in 1947 was 8.09 per cent. 57.27 per cent of the total produced in Oregon that year had leaf and stem content of 8 per cent or less (Tr. 342, 343).

The court is also referred to a finding made by the trial court in paragraph 10 in which these words are used (Tr. 13): "The leaf and stem content of said late cluster hops was eleven per cent or three per cent more than the average of eight per cent recognized in the hop trade in Oregon in 1947." This finding establishes that the plaintiff's hops had 37½ per cent more extraneous leaves and stems than the average of the hops harvested and baled in Oregon in 1947.

The testimony of the plaintiff's witnesses is not in conflict with the foregoing but is directed simply to the question whether his hops were of average or "merchantable" quality. The defendant's witnesses, on the other hand, directed their testimony to the question whether such hops were of "prime quality" as that term is defined in the warranty itself.

It is equally evident that if the court construes this contract in the manner advocated by the defendant, it must be said that there is no substantial evidence tending to establish that the plaintiff's hops were of prime quality.

1. Paraphrase of Paragraph 14 of Findings of Fact (Tr. 15):

> (c) The plaintiff's hops were substantially equal in quality to cluster hops actually accepted in 1947 by the hop trade generally and by the defendant under contracts containing the same type of quality provisions.

In the first place, it is well settled that evidence of collateral transactions is not relevant when offered to establish the terms of a contract between the parties or that it was breached by one of them, for the reason that the rights of the parties can not be affected or concluded by such collateral transactions.

Citations supporting that proposition are found in the Geschwill brief, page 31.

In the second place, there is no evidence in support of the finding now being considered, except such as is so indefinite as to be wholly meaningless.

2. Paragraph 13 of Findings of Fact (Tr. 15):

"Upon the facts neither claimed defect (that the plaintiff's hops were blighted and 'dirty picked') was material."

While the materiality of the objection advanced by the defendant is probably a mixed question of law and fact, it is clear that, insofar as the finding is one of fact, it is unsupported by any substantial evidence.

The oral testimony produced by the defendant shows that the plaintiff's hops were seriously or heavily damaged by mildew. Furthermore, the trial court found as a fact that these hops contained 37½% more leaves and stems than the average lot of 1947 hops grown in the Willamette Valley (Tr. 13).

3. Paragraph 14 of Findings of Fact (Tr. 15):

"Defendant did not rely upon any warranty or representation, whether contained in the contract or otherwise, that said hops would be any different in condition or quality than said hops actually were when tendered and delivered."

There is no testimony whatever which remotely tends to support that finding. Both of these parties signed this contract containing the express warranty we have been considering, and it must be conclusively presumed that the defendant would not have entered into this contract if it had not expected and desired to receive prime quality hops, at least in the absence of substantial proof to the contrary. There was no such evidence.

4 Williston on Contracts, Section 972.

4. Paragraph 7 of Findings of Fact (Tr. 12):

"Plaintiff duly raised, harvested, cured and baled said crop of 1947 late cluster hops, and in accordance with said contract delivered the same in warehouse at Mt. Angel, Oregon."

5. Paragraph 7 of Findings of Fact (Tr. 12):

"Plaintiff duly performed all of the terms and conditions of said contract on his part to be performed."

If what has been said in the argument under this heading I is correct and sound, the plaintiff did not perform all of the terms and conditions of said contract in such manner as to meet the obligations imposed thereby.

6. Paragraph 10 of Findings of Fact (Tr. 13):

"According to the general custom of the trade that year, which was known to the parties, such leaf and stem content was compensated for, and the grower market price was computed, by deducting one cent per pound for each one per cent the leaf and stem content exceeded eight per cent."

This finding is challenged under this heading I, for the reason that it was probably intended to be interpreted to mean that hops having a leaf and stem content far in excess of eight per cent, such as eleven per cent, must be, by such custom, accepted by the buyer and that his only remedy is a reduction of the price.

This finding is clearly erroneous and is without any support whatever in the evidence. Furthermore, if such custom did exist, it has no application to this case.

The reasons for these conclusions will be briefly stated:

(a) Only one witness, Mr. Harold W. Ray, gave any testimony with respect to a custom of this sort (Tr. 178, 179, 197, 198). This is insufficient proof of custom under Oregon law, as Section 2-902, O.C.L.A., declares that usage must be proved by the testimony of at least two witnesses. That section provides:

> "Usage, perjury and treason shall be proved by the testimony of more than one witness; usage by the testimony of at least two witnesses; * * * ."

Loland v. Nelson, 139 Or. 581, 8 Pac. 2d. 82.

(b) The only testimony relating to a custom of this sort was that it arose after September 1, 1946, when the O.P.A. price regulation ceased to be effective. Beginning in the 1944 growing season the so-called sliding scale had been imposed upon sellers and buyers alike by the price regulation covering hops, which could not have the effect of creating a custom such as is expressed in this finding. Certainly no such custom existed when this contract was executed on February 7, 1944 (Tr. 197, 198, 341).

It is well settled that evidence of usage and custom is admissible and may be given effect solely for the purpose of explaining the meaning of a term in a contract, on the theory that the parties are presumed to have contracted with reference to it.

Oregon Fisheries Co. v. Elmore Packing Co., 69 Or. 340, 138 Pac. 862.

National Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621.

Thomas v. Guarantee Title & Trust Co., 81 Oh. St. 432, 91 N.E. 183.

In Oregon, of course, we have a statute in which this principle is incorporated, Section 2-228, O.C.L.A., which contains this language:

> "In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:
> " * * * * *
>
> "(12) Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation;
> " * * * * *."

If the custom did not exist when the contract was executed, it can have no possible effect as an aid in the interpretation of the contract.

(c) The custom expressed in this finding is, by implication, contrary to the terms of the contract, as that instrument contains no provision whatever for a reduction in price in any contingency.

It has long been established that a custom or usage cannot be given effect if it is inconsistent with the contract of the parties. Furthermore, it is a sufficient ground for rejecting a custom that it is excluded by the contract by necessary implication.

Port Investment Co. v. Oregon Mutual Fire Ins. Co., 163 Or. 1, 94 Pac. 2d. 734.

In the present case the contract itself declares that when the grower has selected a contract price, that figure is the amount payable for the hops. If they are of contract grade, quality and condition and are accepted by the buyer the contract therefore excludes by implication any reduction in price based upon a sliding scale.

(d) The only witness who mentioned a custom of this sort testified that the sliding scale operated to give a buyer a premium when his leaf and stem content was less than eight per cent but did not have the effect of reducing the price when the leaf and stem content was greater than eight per cent (Tr. 178, 179).

(e) Mr. Ray, the witness referred to, also emphasized that the sliding scale could not under any circumstances be given effect to compel the acceptance of hops as of prime quality, which did not meet all the requirements of the contract with respect to grade, quality and condition (Tr. 178, 179).

One of these requirements is that the hops must be cleanly picked. In the present case, it is acknowledged by the plaintiff and his own witnesses that his hops were not cleanly picked (Tr. 152, 154, 155, 161). This was one of the conditions which prevented their classification as prime quality hops.

If the court construes the term "prime quality" to mean what the other expressions in the warranty specify, and to mean that the hops must be free of damage by mildew, it follows from what has been stated herein that the plaintiff has produced no evidence whatever

that his hops met the standards of quality and condition expressed in the contract of sale.

One additional finding should be challenged as it was intended to cast doubt upon the good faith of the defendant in rejecting the plaintiff's hops. That finding, in paragraph 16 (Tr. 15, 16), is in these words: " * * * there had been a material decline in the general market price and demand for 1947 Oregon late cluster hops; * * * ."

No evidence whatever was introduced in support of that finding. The market price of hops did not decline prior to the latter part of November, 1947. Mr. R. M. Walker, who was produced as a witness by the plaintiff in the Geschwill case, acknowledged that the market price of prime hops remained at 85 cents and 90 cents until the end of November, 1947 (Geschwill Tr. 246). Mr. Ray and other witnesses testified that there was a scarcity of prime quality hops in 1947 and that there was a good market for them throughout 1947 (Geschwill Tr. 362, 405, 470, 475, 476), and that the market price for hops of the type then available began to decline during the latter part of November (Exhibit 13, Tr. 53, 56; Exhibit 14, Tr. 53, 57) (Geschwill Tr. 246, 247; Geschwill Exhibit 33, Tr. 285).

The defendant respectfully contends that under these circumstances the findings discussed herein are clearly erroneous and should be set aside by reason of Rule 52 (a), Federal Rules of Civil Procedure, Title 28, U.S. C.A., following Section 723c, as it has been interpreted and applied in the cases relied upon in the Geschwill brief, page 40.

II

THE DEFENDANT WAS NOT BOUND TO TAKE DELIVERY OF THE PLAINTIFF'S HOPS AND WAS JUSTIFIED IN REJECTING THEM

Assuming that the conclusions stated in the argument under heading I are sound and that the hops tendered to the defendant did not meet the standards of grade, quality and condition specified in the contract of sale, the defendant was not bound to take delivery of such hops and was justified in rejecting them.

This is established by the decisions discussed in the Geschwill brief, pages 41 to 45. The argument therein is incorporated into this brief by reference.

III

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PLAINTIFF SUBSTANTIALLY PERFORMED ALL OF THE TERMS AND CONDITIONS OF THE CONTRACT ON HIS PART TO BE PERFORMED, AND THAT THE DEFENDANT WRONGFULLY REFUSED TO AND DID NOT PERFORM ITS OBLIGATION UNDER SAID CONTRACT

This is established by the argument under headings I and II, which is incorporated herein by reference.

IV

THE FINDING OF FACT THAT THE DEFENDANT ACCEPTED THE PLAINTIFF'S CLUSTER HOPS IS CLEARLY ERRONEOUS AND IS UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE, AND IS CONTRARY TO LAW

The entire paragraph in which this finding appears, paragraph 8 (Tr. 12), must be considered as it contains these three separate but related findings:

1. "At the time said contract was entered into, and at the time of the delivery and weighing in of the late cluster hops as aforesaid, it was an established usage and custom in the hop trade in Oregon, which was known to the parties hereto, that such weighing in of hops by the buyer following such an inspection constituted an acceptance of such hops.
2. "The parties did not agree upon any change in or deviation from, and plaintiff did not waive, said established custom and usage.
3. "Defendant in fact accepted said one-half of the 1947 crop of late cluster hops produced by plaintiff as aforesaid, * * * ."

1. The finding that it was an established usage and custom in the hop trade in Oregon that the weighing of hops by the buyer following an inspection constituted an acceptance of such hops.

The defendant contends that the supposed custom should not be given effect for these reasons:

(a) The evidence is insufficient to established that such custom or usage existed in Oregon.

Only two witnesses testified during the trial of this and the two preceding cases that a custom or usage existed by which the weighing of hops following an inspection of them constituted an acceptance of such hops: Mr. Kever and Mr. Glatt. These two men did not agree; in fact, there is considerable variance in their testimony.

It is necessary, at the outset, to point out that when the plaintiff's hops were sampled and weighed at the warehouse on September 25, 1947, the leaf and stem content had not been determined. In fact, the necessary samples of these hops were taken on that day and the results of that determination were not available to these parties until October 9, 1947, two weeks later (Exhibit 1, Tr. 53).

Mr. Kever testified that it is generally considered in the hop trade that the weighing of the hops is an acceptance of them. He said that this is true in spite of the fact that the leaf and stem content has not been determined when they are weighed and the percentage of leaves and stems might be shown by the official inspection to be very high (Tr. 134, 142, 143). On the other hand, Mr. Glatt testified that it is the general practice that weighing constitutes an acceptance providing that the parties have previously arrived at an agreement that those hops will be accepted at a certain price and providing that the general line of samples cut or tryings will meet the type samples (Tr. 126).

It is apparent, therefore, that only one witness, Mr. Kever, testified that by virtue of a custom or usage in the hop trade, weighing constituted an acceptance in spite of the fact that the leaf and stem content had not been determined. It is also apparent that while two witnesses testified that a custom does exist, their testimony is very different. Mr. Kever testified that weighing constitutes an acceptance in spite of the fact that the leaf and stem content has not been determined. Mr. Glatt testified that weighing constitutes an acceptance only when the parties have reached an agreement that the hops will be accepted at a certain price and the general line of samples cut or tryings will meet the type samples.

The defendant contends that under these circumstances it cannot be said that a custom or usage existed on September 25, 1947, that the weighing of hops constitutes an acceptance under any and all circumstances.

In the first place, the testimony of only one witness supports the custom stated in this finding. This is insufficient proof of custom or usage under Oregon law, as Section 2-902, O.C.L.A., declares that usage must be proved by the testimony of at least two witnesses.

Loland v. Nelson, 139 Or. 581, 8 Pac. 2d. 82.

Furthermore, the testimony of these two witnesses being at variance, it cannot be said that the custom is uniform or that it has been established with the requisite degree of certainty.

In *Port Investment Co. v. Oregon Mutual Fire Ins. Co.,* 163 Or. 1, 94 Pac. 2d. 734, the court made this statement:

> "A custom or usage must be ancient, notorious, uniform, not opposed to a well settled rule of law, and not inconsistent with the contract of the parties."

In *Sickelco v. Union Pacific R. Co.,* 111 Fed. 2d. 746, decided by this court, it was held that the plaintiff failed to meet the burden of proving the custom relied upon by him. The court said:

> "We think the general doctrine is well put in 17 Corpus Juris, 451, Customs and Usages, Sec. 10, '* * * a usage or custom of trade must be certain and uniform in order to be binding. It is not sufficient that it is merely as certain as the nature of the business to which it applies will permit. Further, a loose and variable practice will not be allowed to control the rights of the parties, nor will an alleged usage which leaves some material element to the discretion of the individual.'
>
> "And in the same volume of Corpus Juris, 453, Customs and Usages, Sec. 11, 'A custom must be compulsory, and not left to each one's option to obey it. Likewise, a usage, in order to be regarded as entering into a contract, must be clearly distinguished from mere acts of courtesy or accommodation.'
>
> "This action was instituted originally in the California Superior Court; the contract set up by the plaintiff is alleged to have been entered into in California. We therefore look to the California law to determine what sort of custom or usage will control the rights of the parties. We find that the California courts recognize the requirements as to certainty and uniformity to establish a custom or usage."

After considering the evidence, this court made the following statement:

> "This evidence, taken at its full possible value, could not support a finding of a uniform custom or usage

to pay mechanical supervisors their full pay for periods of incapacity, regardless of the length of the period, as contended for by the plaintiff. We therefore hold that the trial court committed no error in directing a verdict as to plaintiff's first cause of action."

(b) If it could be said that the evidence does support the finding that a custom existed that weighing constituted an acceptance under all circumstances, there certainly is no evidence that such custom or usage is ancient or that, in fact, it existed when this contract was entered into on February 7, 1944, approximately five years before the trial of this case.

Evidence of usage and custom may be given effect solely for the purpose of explaining the meaning of a term in a contract on the theory that the parties presumably contracted with reference to it.

Oregon Fisheries Co. v. Elmore Packing Co., 69 Or. 340, 138 P. 862.

National Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621.

Thomas v. Guarantee Title & Trust Co., 81 Oh. St. 432, 91 N.E. 183.

In Oregon, the principle that custom and usage may only be given effect to interpret an existing contract, is incorporated in a statute, Section 2-228, O.C.L.A., which provides:

"In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:

"* * * * *

"(12) Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation; * * * * *."

If the custom did not exist when the contract was executed, it can have no possible effect as an aid to the interpretation of the contract.

(c) The custom or usage set forth in the finding cannot be given effect and has no application to this case for the reason that the weighing did not follow an inspection of the hops.

The defendant contends that no inspection was made by it at or before the time the hops were weighed in the warehouse, for the reason that the employees of the defendant's Oregon representative, who sampled the hops at that time, had no authority to accept or reject them. What took place at the time of or just prior to the weighing was a sampling, rather than an inspection to determine whether the hops met the standards of grade, quality and condition specified in the contract.

Neither Mr. Ray who had been engaged in the hop business for 50 years nor any of his employees had any authority whatever to accept or reject the plaintiff's 1947 cluster hops, at the time of the weighing or at any other time during or after the 1947 season (Tr. 437, 447). The examination of the hops made by Mr. Ray's employees at the time of the weighing was for the purpose of sending representative samples to the principal office of the defendant in Washington, D. C., to enable the officers of the defendant to make the inspection and determine

whether such hops should be accepted or rejected. The examination made by Mr. Ray's employees at the time of the weighing had nothing to do with the acceptance or rejection of the hops other than the furnishing of representative samples to the defendant's officers. The decision then rested with the latter. They retained the sole authority in 1947 to decide whether or not a particular lot of hops should be accepted (Tr. 437, 447).

This discussion will be elaborated upon in the argument under subdivision 3 under this heading IV.

It follows from what has been said herein that the defendant did not "receive" the hops at the warehouse, and that the finding in paragraph 7 (Tr. 12) that it do so, is clearly erroneous as that term is interpreted in the cases cited in the Geschwill brief, page 40, if that finding is construed to mean that the defendant then accepted the hops or took possession of them. There is no evidence in support of that finding as so construed.

2. The finding that the parties did not agree upon any change in or deviation from, and the plaintiff did not waive, such custom and usage.

If the contentions made by the defendant in the argument of subdivision 1 under this heading IV are sound, there was no custom or usage that weighing constituted an acceptance, which was applicable to this case. If the court adopts the finding with respect to such custom and usage, however, it is acknowledged that there is some evidence that the parties did not agree upon any deviation from it.

3. The finding that the defendant accepted the plaintiff's hops.

The defendant contends that there was no acceptance of the hops when they were weighed, and that the finding that there was an acceptance is contrary to the uncontradicted evidence and the law.

It will be assumed in the argument under this subdivision 3 that the custom referred to in the finding considered under subdivision 1 of this heading IV, actually did exist when the hops were weighed.

The defendant contends that such custom and usage did not and could not apply to the transaction between these parties for the reason that no custom or usage can be given effect contrary to a rule of law, in this case the Uniform Sales Act and the decisions interpreting it.

It is established beyond any doubt, of course, that a custom contrary to a well settled rule of law cannot be given effect.

Port Investment Co. v. Oregon Mutual Fire Ins. Co., 163 Or. 1, 94 Pac. 2d. 734.

Thomas v. Guarantee Title & Trust Co., 81 Oh. St. 432, 91 N.E. 183.

Section 47 of the Uniform Sales Act, Section 71-147, O.C.L.A., declares that the plaintiff was bound to give the defendant a reasonable opportunity of examining the hops tendered at the warehouse for the purpose of ascertaining whether they were in conformity with the contract. The material portions of Section 47 of the Act are as follows:

"(1) Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

"(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

"(3) * * * * * *."

The defendant contends that a reasonable opportunity of examining the hops for the purpose of ascertaining whether they were in conformity with the contract, under the existing circumstances, was one which gave the defendant's officers in Washington, D. C., a reasonable opportunity of examining the 10th bale samples of such hops which were known to be representative of the entire lot, in order that they could determine whether such hops were of contract grade, quality and condition. If this contention is sound, there could have been no acceptance when the hops were weighed, as the 10th bale samples, after it was found by Mr. Ray's employees that they were representative of the lot, still had to be sent to Mr. Ray's Hillsboro office and from there to Washington, D. C., and the defendant still had a reasonable opportunity of examining them, and still had to notify the plaintiff whether they were accepted or rejected.

It is entirely understandable, therefore, that this section has been construed to mean that if upon such

examination it appears that the hops so tendered were not of the grade, quality and condition described in the contract, the defendant was privileged to refuse to accept them, that is, to reject them. This is true although a conditional title may have passed to the defendant upon the delivery of the hops to the warehouse.

Kitterman v. Eagle Pine Co., 122 Or. 137, 257 Pac. 815.

Crosland v. Sloan, 123 Or. 243, 261 Pac. 701.

Olsen v. McMaken & Pentzien, 139 Neb. 506, 297 N.W. 830.

Hostler Coal & Lumber Co. v. Stuff, 205 Ia. 1341, 219 N.W. 481.

Struthers-Ziegler Cooperage Co. v. Farmers Mfg. Co., 233 Mich. 298, 206 N.W. 331.

The defendant contends that each of the subsections of Section 47 of the Act gave the defendant such reasonable opportunity of examining the hops. The two subsections will accordingly be separately considered.

Section 47(1) of the Uniform Sales Act

Section 47(1) of the Act, Section 71-147(1), O.C. L.A., was applicable to the situation existing on September 25, 1947, when these hops were sampled and weighed by the defendant in the warehouse. Consequently, there could be no acceptance on that occasion, nor until the defendant's officers communicated their decision to the plaintiff, and not then unless they informed him that the hops were acceptable.

Section 47(1) of the Act was applicable for these reasons:

(a) The defendant had not previously examined the hops, within the meaning of that subsection, that is, it had not examined the hops prior to the weighing of them.

In order that this may be demonstrated, it is necessary to consider certain facts. Neither Mr. Ray nor anyone in his organization in Oregon, had any authority whatever in 1947 to make the decision whether any particular lot of hops, including the plaintiff's, should be accepted or rejected (Tr. 437, 447). Mr. Ray sent to the defendant's office in Washington, D. C., prior to the delivery of the plaintiff's hops to the warehouse, four type samples, which were intended to indicate in a general way the probable quality of the entire lot of 193 bales. After the defendant had examined these type samples, it instructed Mr. Ray to take representative 10th bale samples, that is, a sample from approximately every 10th bale, and submit these to the defendant's office in Washington. Accordingly, 10th bale samples were taken after the delivery of the hops to the warehouse and, after these samples had been compared with the tryings, that is, a handful of hops from each bale, to make certain that the 10th bale samples were representative of the entire lot, these 19 samples, after being thus verified were sent to the defendant in Washington.

The defendant contends that the acts of Mr. Ray's employees at the warehouse, in drawing the 10th bale samples and the tryings and comparing both, with each

other and the type samples, did not constitute an examination of the hops for the purpose of ascertaining whether they were in conformity with the contract. These acts were in reality simply the preparation of representative samples in order that, from such samples, the defendant's officers in Washington might make the examination for the purpose of ascertaining whether the hops were in conformity with the contract.

The defendant contends that this is particularly true because the employees of Mr. Ray had no authority to ascertain whether the hops were in conformity with the contract. Their only authority was to make certain that the samples sent to the defendant were fairly representative of the entire lot. Inasmuch as the decision whether the hops were in conformity with the contract was required to be made and was made in Washington, D. C., that is where the examination was made which forms the basis for that decision.

The defendant's inspection of the four type samples cannot be regarded as a previous examination within the meaning of Section 47(1) of the Act for the reason that these were intended to be and were simply preliminary samples, sent to the defendant in Washington without any previous attempt to make certain that they were representative of the entire lot. In other words, these type samples were simply chosen from the bales at random and were not compared in any way with tryings from the bales.

(b) A reasonable opportunity of examining the hops for the purpose of ascertaining whether they were in

conformity with the contract was one which permitted the person or persons making the decision whether they did conform with the contract, to see and examine the 10th bale samples which had been previously compared with the tryings and found to be representative of the entire lot.

In view of the fact that the mildew attack in 1947 was the most severe that could be recalled, so far as damage to the cones themselves was concerned (Geschwill Tr. 426, 427) (Smith Tr. 256), it is entirely reasonable that the defendant should have insisted that the decision whether a particular lot of hops should be accepted, should be made by its officers in Washington.

It is equally reasonable, therefore, that the persons inspecting the hops and making the decision should have the best samples available. These were, of course, the 10th bale samples after they had been determined to be representative of the entire lot by a comparison with the tryings from the individual bales. The four type samples were clearly not the best samples available as no attempt was made before they were sent to Washington, to make certain that they were representative of the lot.

In conclusion, it should be stated that neither in this case nor in either of the two preceding cases, has the plaintiff contended that the defendant acted unreasonably in sending the 10th bale samples to the east, or that more than a reasonable length of time was required in the process of sampling in Oregon, and inspecting and making the decision in the east.

Section 47(2) of the Uniform Sales Act

Section 47(2) of the Act, Section 71-147(2), O.C. L.A., was applicable when the hops were tendered to the defendant in the warehouse for these reasons:

(a) The defendant impliedly requested that it be afforded a reasonable opportunity of examining the hops for the purpose of ascertaining whether they were in conformity with the contract. Such request may clearly be implied from the fact that Mr. Ray's employees took the 10th bale samples and compared them with the tryings, in the presence of the plaintiff in the warehouse. This implied request was, of course, for such inspection as was reasonable under the circumstances. What amounted to a reasonable inspection for the purpose of making the necessary decision, has already been considered in the previous subdivision under this heading IV.

(b) There was no agreement that an examination of the hops would not be permitted after they were weighed. The custom itself cannot have or be given the effect of creating an agreement where none existed by reason of the conduct of the parties, as the sole purpose of evidence of usage and custom is to explain the meaning of a term in a contract already existing.

Oregon Fisheries Co. v. Elmore Packing Co., 69 Or. 340, 138 P. 862.

Smith v. Lofler, 137 Or. 230, 2 Pac. 2d. 181.

National Savings Bank v. Ward, 100 U.S. 195, 25 L. Ed. 621.

Thomas v. Guarantee Title & Trust Co., 81 Oh. St. 432, 91 N.E. 183.

Smith v. Lofler, supra, was subsequently overruled on a wholly different point.

In Oregon, the principle that custom and usage may only be given effect to interpret an existing contract, is incorporated in a statute, Section 2-228, O.C.L.A., which provides:

> "In conformity with the preceding provisions, evidence may be given on the trial, of the following facts:
>
> " * * * * * *
>
> "(12) Usage, to explain the true character of an act, contract, or instrument, where such true character is not otherwise plain; but usage is never admissible except as a means of interpretation; * * * * * * ."

In conclusion, Section 47 of the Act gave to the defendant the right to an inspection of 10th bale samples determined to be representative of the lot, in Washington, D. C. This naturally could not be accomplished before the weighing of the hops. Consequently, the custom that weighing constituted an acceptance under all circumstances, if found to exist, could not be given effect as it was clearly contrary to Section 47 of the Act and the decisions interpreting it.

Finally, there is no evidence whatever that the defendant accepted these hops, that is, that it intimated to the plaintiff that it accepted them, or performed any act in relation to them which was inconsistent with the ownership of the plaintiff.

Section 48 of the Act, Section 71-148, O.C.L.A., plainly implies that under such circumstances there was no acceptance. That section declares:

> "The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller, * * * ."

It follows from what has been said under this heading IV, that the findings being considered are clearly erroneous as that term has been construed in the cases discussed in the Geschwill brief, page 40. These findings are also contrary to law.

It follows from what has been said herein that the defendant did not "inspect" or examine the hops at the warehouse on September 25, 1947, within the meaning of Section 47 of the Act, and that the finding in paragraph 7 (Tr. 12) that it did so, is clearly erroneous as that term is interpreted in the cases cited in the Geschwill brief, page 40. There is no evidence in support of such finding.

V

THE FINDING OF FACT THAT THE DEFENDANT DID NOT REJECT THE PLAINTIFF'S HOPS IS CLEARLY ERRONEOUS AND IS UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE, AND IS CONTRARY TO LAW

This finding is in paragraph 15 in these words (Tr. 15):

> "Without rejecting said late cluster hops, defendant advised plaintiff in October, 1947, that it did not wish to take said hops."

It is acknowledged in the plaintiff's complaint (Tr. 4) that the "defendant advised plaintiff in October, 1947, that it did not wish to take said hops," referring to the plaintiff's cluster hops.

The same assertion appears in two paragraphs of the Findings of Fact, 13 (Tr. 14) and 15 (Tr. 15).

It must be assumed, therefore, throughout the consideration of this case that such is the fact.

The defendant contends that the notification given to the plaintiff in October, 1947, that the defendant "did not wish to take said hops," coupled with the fact that the defendant declined to receive such hops or a warehouse receipt representing them, constitutes a rejection within the meaning of the Uniform Sales Act, and that the words in this finding which imply that there was no rejection are contrary to the established facts and the law, and are therefore wholly meaningless.

Section 50 of the Uniform Sales Act, Section 71-150, O.C.L.A., provides:

> "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he notifies the seller that he refuses to accept them."

This section plainly declares that a buyer need not use the word "reject" when he refuses to take delivery of goods and pay for them, having the right to do so. All that he needs to do to assert his right to refuse to take delivery of the goods, is to refuse to accept them and notify the seller that he so refuses.

The word "accept" must, of course, receive its plain and ordinary meaning, there being nothing in the Act or in this case to require that it be given any different meaning.

> *Superior Oil Syndicate v. Handley,* 99 Or. 146, 195 Pac. 159.
>
> *Cary v. Metropolitan Life Insurance Co.,* 141 Or. 388, 17 Pac. 2d. 1111.

The principal meaning of "accept" stated in Webster's New International Dictionary is: "To receive (a thing offered to or thrust upon one) with a consenting mind." The same authority declares that "receive" means: "to come into possession of, get, acquire, or the like, from any source outside of oneself or itself, without direct effort."

It is clear that the defendant did not receive the plaintiff's hops, nor a warehouse receipt or certificate of any kind representing them, as it did not come into possession of, get, or acquire either the hops or a warehouse receipt, with a consenting mind or otherwise (Tr. 105).

It is equally clear that the defendant did not accept the hops, and that when it declined to receive them or a receipt representing them, it refused to accept the hops themselves within the meaning of Section 50 of the Act, Section 71-150, O.C.L.A.

It is established, furthermore, that the defendant notified the plaintiff that it refused to accept the hops (Tr. 4, 14, 15). The allegation in the complaint (Tr. 4) and the two findings (Tr. 14, 15), can support no other

inference. A statement that one does not wish to do something, followed by his refusal to do it, certainly is a notice that he refuses to do it.

It is plain, therefore, that the defendant met both requirements imposed upon one seeking to refuse to take delivery of goods who has the right to do so: it refused to accept the goods and it so notified the plaintiff.

A refusal to accept goods, coupled with a notice of refusal, is colloquially and informally known as a rejection of them, particularly in the opinions in cases in which the right of inspection and refusal to accept is considered. This does not mean, however, that the word "reject" must be used in refusing to accept and in conveying a notice of refusal. The statute does not require that one who refuses to accept goods must notify the seller that he "rejects" them. The statute simply declares that the one refusing to accept goods must notify the seller that "he refuses to accept them."

Inasmuch as the conduct of the defendant in this case fully satisfies the statute, and is commonly characterized colloquially and informally as a rejection, the finding in this case that there was no rejection is contrary to the admitted and established facts and to the Uniform Sales Act.

The court found that the defendant notified the plaintiff that it did not wish to take said hops. The testimony which supports that finding was given by Mr. Noakes and Mr. Davis. Mr. Noakes testified that on October 28, 1947, he told the plaintiff that the defendant could not accept his cluster hops on the contract

because they did not make the grade (Tr. 292, 293). Mr. Davis testified that he heard Mr. Noakes tell the plaintiff, "We can't take those late hops, Otto" (Tr. 355). This finding that the defendant notified the plaintiff that it did not wish to take his hops, is an acceptance and adoption of the testimony of these two witnesses. Consequently, it must be said in this case that the defendant notified the plaintiff that it refused to accept his hops. Thus, by reason of what has already been said in the argument under this heading V, the finding that there was no rejection of the hops is meaningless and contrary to law, and should be disregarded. It must also be said that such finding is clearly erroneous as that term is construed in the cases cited in the Geschwill brief, page 40.

VI

THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE FACTS OF THIS CASE DO NOT BRING IT WITHIN THE OPERATION OF THE PROVISIONS OF THE UNIFORM SALES ACT WHICH PERMIT SUCH AN ACTION

An action for the price can be maintained only when authorized by Section 63 of the Uniform Sales Act, Section 71-163, O.C.L.A. That section provides:

> "(1) Where, under a contract to sell, or a sale, the property in the goods has passed to the buyer, and

the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods.

* * * * *

"(3) Although the property in the goods has not passed, if they cannot readily be resold for a reasonable price, and if the provisions of section 71-164(4) are not applicable, the seller may offer to deliver the goods to the buyer, and, if the buyer refuses to receive them, may notify the buyer that the goods are thereafter held by the seller as bailee for the buyer. Thereafter the seller may treat the goods as the buyer's and may maintain an action for the price."

The cases which support this proposition are cited in the Geschwill brief, pages 46 and 47.

Section 63(3) of the Uniform Sales Act

Section 63(3) of the Act, Section 71-163(3), O.C. L.A., does not authorize a recovery of the price in this action for the reason that there is not the slightest evidence in this case that the plaintiff notified the defendant that the hops would thereafter be held by the plaintiff as bailee for the defendant.

Under these circumstances, the argument under this subdivision of heading IV of the Geschwill brief, pages 47 and 48, establishes that there can be no recovery of the price under Section 63(3) of the Act. That argument, therefore, is incorporated herein by reference.

Section 63(1) of the Uniform Sales Act

Section 63(1) of the Act, Section 71-163(1), O.C.L. A., does not authorize a recovery of the price in this action for the reason that the property in the cluster hops referred to in the plaintiff's complaint has not passed to the defendant within the meaning of that section.

In the argument under this subdivision of heading IV of the Geschwill brief, pages 48 to 61, three detailed contentions are stated on pages 48 and 49.

The first of these has no application to the present case as the contract with which we are now concerned has no provision similar to that in the Geschwill contract. The second and third are retained, however, and, accordingly, the entire argument under this subdivision of heading IV of the Geschwill brief, pages 48 to 61, is incorporated herein by reference, with the exception of the argument under contention 1, pages 49 to 52, and all references made to that contention.

The two remaining contentions are repeated herein for the sake of clarity, under the numbers which they bear in the Geschwill brief:

2. This transaction was a sale for cash, and title has never passed to the defendant for the reason that the defendant has never paid for these hops.
3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

The explanation of these contentions appearing in the Geschwill brief, page 49, is restated as follows:

An explanation of these two contentions is desirable. 2 is not dependent in any way upon a finding that the defendant was justified in rejecting the plaintiff's hops. This contention is operative if such rejection was wrongful. The acceptance of 2 is a sufficient basis for a reversal of this judgment and the entry of a judgment for the defendant. 3 is dependent upon a finding by this court that the defendant was justified in rejecting the plaintiff's hops, but 3 need not be considered if 2 is sustained. The acceptance of 3 is likewise a sufficient basis for a reversal of the judgment and the entry of a judgment for the defendant.

These two contentions are repeated herein as certain additional comments are necessary.

2. This transaction was a sale for cash, and title has never passed to the defendant for the reason that the defendant has never paid for these hops.

The clause which governs the transaction in the present case, is as follows (Exhibit 1-A, Tr. 53):

> "* * * upon delivery and acceptance of said hops the buyer will pay in current funds of the United States, or the equivalent thereof, the balance due on said hops * * * ."

3. If it can not be said that this was a sale for cash, a conditional title passed to the defendant upon the delivery of the hops to the warehouse. This title was defeated by the rejection of the hops due to their failure to meet the warranty.

One sentence in the Findings of Fact in the Geschwill case was challenged in that brief, pages 59 to 61.

A somewhat similar finding was made in the present case in paragraph 7 (Tr. 12), in these words:

> "On September 25, 1947, at said warehouse defendant caused one-half of said 1947 crop of late cluster hops to be segregated in a manner which was acceptable to defendant and which was in conformance with the prior practice of the parties. At that time the bales of hops which constituted said one-half of said crop of 1947 late cluster hops were received, inspected, sampled, marked and weighed by defendant, and were identified, appropriated to the contract and set aside."

The defendant contends that this finding is not subject to the interpretation that the plaintiff appropriated the hops to the contract with the assent of the defendant. If the court concludes that the finding may be so construed, the defendant contends that it is clearly erroneous and unsupported by any substantial evidence, for the reasons stated in the argument under contention 3 in the Geschwill brief, pages 59 (bottom line) to 61.

The portion of this finding which declares that the plaintiff's hops were received and inspected by the defendant on September 25, 1947, at the warehouse, is challenged in the argument under heading IV.

If it should be determined by the court that the plaintiff is entitled to recover the price of his hops less the amount realized from the resale, the defendant contends that the findings of fact with respect to the price of the plaintiff's hops are clearly erroneous and should

be set aside and that the contract fixes the price at 45 cents per pound (Exhibit 1-A, Tr. 53).

The findings challenged are as follows:

1. Paragraph 9 of Findings of Fact (Tr. 13):

"Said grower market price of 85 cents a pound for said late cluster hops was selected by plaintiff and communicated to defendant in a manner and at a time which was acceptable to defendant and which conformed to the prior practice between the parties."

2. Paragraph 11 of Findings of Fact (Tr. 14):

"The grower market price for said hops under said contract was 85 cents per pound net weight, less three cents per pound deduction for leaf and stem content as aforesaid * * *. The contract price for said hops was 82 cents per pound or a total of $30,863.16."

The contract price for the hops was fixed in the contract at either 45 cents per pound or the market price on such date during a specified period in 1947 as the seller might elect (Exhibit 1-A, Tr. 53). The plaintiff on September 11, 1947, orally selected the then market price of 85 cents per pound for the cluster hops (Tr. 303). That selection, however, was not confirmed in writing as required by the contract (Tr. 71, 303; Exhibit 1-A, Tr. 53), although the defendant had issued express instructions that such requirement be complied with (Tr. 228), and had not authorized any departure therefrom (Tr. 217). Furthermore, there is no evidence in this transcript that the defendant knew that its instructions to secure the designation of price in writing had not been carried out in previous years.

The defendant contends, therefore, that these findings are clearly erroneous as that term has been construed in the cases discussed in the Geschwill brief, page 40.

VII

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE PROPERTY IN THE PLAINTIFF'S CLUSTER HOPS PASSED TO THE DEFENDANT, AND THAT THE DEFENDANT BECAME OBLIGATED TO PAY AN AMOUNT CLAIMED TO BE THE PRICE OF THE HOPS UNDER SAID CONTRACT, LESS THE AMOUNT REALIZED FROM THE RESALE

This is established by the argument under heading VI, which is incorporated herein by reference.

VIII

THE PLAINTIFF IS NOT ENTITLED TO MAINTAIN THIS ACTION FOR THE PRICE OF THE HOPS FOR THE REASON THAT THE CONTRACT ITSELF PRECLUDES THAT MEASURE OF RECOVERY

The provision concerning the measure of recovery in the contract we are considering in this case, is in these words (Exhibit 1-A, Tr. 53):

> "* * * should the buyer fail to accept and pay for the hops herein agreed to be sold, the seller not being in default in the terms and conditions hereof

> to be by the seller kept and performed, in the event the market value of the hops shall be less than the contract value, the seller shall be entitled to receive, as liquidated and ascertained damages for such breach on the part of the buyer, the difference in value between the market value of the kind, quality and quantity of hops in this contract mentioned at the specified place of delivery on the 31st day of October, 1947, and the contract value of the quantity of said hops as herein specified."

In view of the similarity between this language and that used in the comparable provision in the Geschwill contract, the argument in the brief filed in that case, pages 62 to 69, establishes in this case as well that the plaintiff is not entitled to maintain this action for the price, but is limited to the measure of damages so specified in the contract.

The court is referred particularly to *Daniels v. Morris,* 65 Or. 289, 130 Pac. 397, 132 Pac. 958, in which the clause in the contract was identical to that in the present case. The Supreme Court of Oregon held that the plaintiff was limited to the measure of recovery so specified in the contract.

This means in this case also that there can be no recovery by the plaintiff as the evidence is uncontradicted that the market value of such hops was no less than the contract price, whether the price is determined to be 45 cents, 82 cents or 85 cents (Tr. 225; Exhibits 13, 14, Tr. 53, 56, 57). Here again, however, this result imposes no undue hardship on the plaintiff, as he could have resold his hops readily, without any loss whatever, if they were of prime quality, at least until the latter part of November, 1947.

IX

THE COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT THE MEASURE OF THE PLAINTIFF'S RECOVERY UPON THE FACTS HERE IS, UNDER OREGON LAW, THE DIFFERENCE BETWEEN THE AMOUNT DUE UNDER SAID CONTRACT AND THE AMOUNT REALIZED FROM THE RESALE

This is established by the argument under heading VIII, which is incorporated herein by reference.

CONCLUSION

It is desired that every reference herein to a portion of the Geschwill brief shall be regarded as an adoption of that portion by such reference.

The defendant respectfully prays that the judgment be reversed and that a judgment be rendered in favor of the defendant.

Respectfully submitted,

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